No. 1167

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United States Circuit Court of Appeals

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Appellants,

vs.

J. D. SPRECKELS & BROS. CO.,

Appellees.

APPELLEES' POINTS AND AUTHORITIES.

NATHAN H. FRANK,
Proctor for Appellees.

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APPELLEES' POINTS AND AUTHORITIES.

This case presents two questions for determination:

1. Was the opening of the decks of the vessel, and the consequent damage to the cargo, the result *either in whole or in part,* of her improper lading?

2. If the damage suffered off Cape Horn was *not* the result, either in whole or in part, of her improper lading, still the vessel could have been repaired at the Falkland Islands, 360 miles distant, and thus prevented the additional

damage which resulted to the cargo in her passage from Cape Horn to Australia.

Is the failure of the master to so repair his vessel an act for which the ship is liable?

And, as auxiliary to this last question,—If the ship be liable for this act of the master, what is the measure of damage?

I.

WAS THE OPENING UP OF THE DECKS OF THE VESSEL, AND THE CONSEQUENT DAMAGE TO THE CARGO, THE RESULT, EITHER IN WHOLE OR IN PART, OF HER IMPROPER LADING?

This is a question of fact. In his opening, counsel calls attention to the severe damage suffered by the vessel off the Horn as evidence that she had met with unusual weather, and he concludes that the damage was the *result* of the bad weather. We, on the other hand, contend that the weather was not unusual weather for Cape Horn, and that, *even though it were admitted to have been unusual, the improper lading of the vessel made her unseaworthy,* and but for such unseaworthiness the damage would not have occurred, notwithstanding the weather.

The difference in our positions regarding this matter is well illustrated by what the Supreme Court says in the case of

The Portsmouth, 9 Wall. 682,

respecting ~~expected~~ excepted perils and the proximate cause of the loss:

> "A loss by a jettison occasioned by a peril of the sea is, in ordinary cases, a loss by perils of the sea. But it is well settled that, if a jettison of a cargo, or a part of it, is rendered necessary by any fault or breach of contract of the master or owners of the vessel, the jettison *must be attributed to that fault or breach of contract, rather than to the sea peril, though that may also be present and enter into the case.* * * * This is a principle alike applicable to exceptions in bills of lading and in policies of insurance. * * * Though the peril of the sea may be nearer in time to the disaster, the efficient cause, without which the peril would not have been incurred, is regarded as the proximate cause of the loss."

See also

The Whitlieburn, 89 Fed. 526,

where this principle is applied to a case of jettison made necessary by *improper stowage.*

In applying this principle to the case at bar, the first question to be determined is as to her lading, and in that connection preliminary to considering the facts, what is the legal duty of the shipowner respecting the lading.

Improper Lading Resulting in Unseaworthiness is Breach of Warranty.—In passing upon this question of legal duty, the District Court has fallen into a palpable error. The decision is based upon a mistaken principle of law, or, perhaps more ac-

curately stated, a mistaken application of a legal principle. In coming to the conclusion that the evidence is not sufficient to establish the fact of improper stowage, the Court says:

> "Stowage, with a view to the proper trim of the vessel and the ease with which it will be able to carry its cargo when at sea, is a matter ~~which~~ which calls for the *judgment* of those under whose supervision it is done. *The carrier is only required to exercise reasonable care and skill in stowing cargo,* and the mere fact that if it had been differently distributed the ship would have been more easy, *does not* necessarily *show* that the cargo was *negligently stowed;* that is, stowed in such a manner as would not have been approved at the time by a stevedore or master of *ordinary skill and judgment,* knowing the voyage on which the vessel was about to sail, and the weather and sea conditions which she might reasonably be expected to encounter. *In order to establish such negligence* as is claimed here, the *disproportion* between the amount stowed in the lower hold and that placed between decks, *must be so great* as to warrant the conclusion that *reasonable judgment* was not used in loading the vessel, and I am not satisfied from the evidence that such great disproportion existed in this case."

From the foregoing, it will at once be seen that the mind of the Court was not directed to the effect of the low stowage in weight of cargo on the seaworthiness of the ship, but, basing his decision upon the idea that the question before him was one of "negligence" or "reasonable judgment" he concludes that *the dif-*

ference between 150 tons more or less *in the lower hold rather than in the between decks* was not in itself such a difference in *number of tons* compared with the whole cargo, as "to warrant the conclusion that *reasonable judgment* was not used". In this conclusion two important elements in arriving at a proper result have been overlooked, (1) The difference of 150 tons in the lower hold rather than in the between decks, though not large *in amount of tonnage,* may be very large *in its effect on the ship's meta center.* And that such was the fact here we expect presently to show from the record. In this connection it will be noticed that in the case of *The Colima,* hereinafter cited, the stowage on deck of only *47* tons *out of a total of over 2181 tons* cargo, ballast and stores, *capsized the ship. 82 Fed. 665.* (2) The legal duty devolving on the ship-owner was not the exercise of "reasonable judgment", nor, "to exercise reasonable care and skill in stowing cargo", but it was the absolute duty to so stow it that the vessel should be seaworthy—it was a warranty.

The Warranty.—That an implied warranty of seaworthiness, absolute in its nature, accompanies the contract of affreighment, must be admitted; and it must further be admitted that such warranty does not depend upon the judgment, skill, care, or negligence of the shipper.

In the language of the Supreme Court, *The Caledonia,* 157 U. S. 130 and 131:

"In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact, seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence. * * *

"In our opinion the shipowner's undertaking is not merely that he will do, and has done, his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage."

The Unseaworthiness.—That a vessel improperly laden *is unseaworthy* within the meaning of such warranty, must also be admitted.

The Whitlieburn, 89 Fed. 526;
The Colima, 82 Fed. 665;
The G. B. Boren, 132 Fed. 887;
The Oneida, 108 Fed. 886;
The Oneida, C. C. A., 128 Fed. 687;
Sumner v. Caswell, 20 Fed. 249;
The William Power, 131 Fed. 136.

In *Sumner v. Caswell,* above cited, the issue is stated by the Court in the following language:

"On the ground that they *used all such care and diligence as could reasonably have been expected in the stowage and ballasting of the ship,* the owners insist that no liability attaches to them; contending that, under a charter of the character described, they are not re-

sponsible as common carriers, but only *for reasonable diligence* as bailees for hire."

The Court held the ship liable because

"Through her mode of lading, in connection with the want of sufficient ballast to prevent her being dangerously top heavy", she was unseaworthy (p. 252), and

"By the nature of the contract, they impliedly and necessarily warrant that the ship is good, and in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy; that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must, of necessity, be exposed in the course of the voyage, and this implied warranty attaches and has reference to all the conditions of the ship at the time she enters upon her voyage" (p. 253).

In *The Whitlieburn* the vessel was "in herself" "in all respects seaworthy", but, "*as loaded* was tender". The Court held that the warranty "speaks from the time the ship sails and makes the owners responsible for her seaworthy condition, not as regards her hull and equipment alone, but also as respects ballasting and loading and stowage of cargo". It was further held that the *risk of any uncertainty* with respect to the loading should fall on the shipowner.

In passing it might also be noticed that the vessel experienced "a gale" in which "she lay well over and took large quantities of seawater on board"; that at other times "she ran before the

wind with much water aboard and burying herself"; that "the crew took to the rigging; three were washed overboard, of whom one was drowned"; that after consultation "the upper cases in the between decks were thrown overboard, after which the ship pursued her course without special difficulty", thus, in many respects paralleling the circumstances set up as "perils of the sea" in the case at bar.

In *The Colima,* the petitioners were held liable because "she was lacking in *seaworthy stability* through her tender model, and *the mode of loading* combined" (p. 670).

In *The Oneida,* the vessel was found unseaworthy "in the stowage and distribution of cargo weights", "through instability and top-heaviness" (p. 887).

If, then, improper lading tends to render the vessel unseaworthy, the rule upon which the judgment of the District Court was based, was erroneous, viz: "stowage with a view to the proper trim of the vessel and the ease with which it will be able to carry its cargo when at sea is a matter which calls for the judgment of those under whose supervision it is done. The carrier is only required to exercise reasonable care and skill in stowage of cargo", etc. On the contrary, in the language, of the Supreme Court above quoted, the shipowner's liability "does not depend on his knowledge or ignorance, his care or negligence". The warranty is absolute that the ship is in fact so

stowed as to render her really fit with said cargo "to undergo the perils of the sea and other incident risks to which she must be exposed in the course of the voyage".

Must be Seaworthy for Cape Horn Weather.—In this connection we desire to call attention to the attempt made by the shipowner, to avoid the effect of the showing respecting the ship's lading, by referring to the damage the vessel suffered off the Horn, and to the violence of the storms she met. It must, however, be borne in mind that the Horn is proverbial for violent storms. "The Horn is a place that we have to provide against for extreme weather" (Quale, p. 106). Storms are the most usual and therefore the expected condition, while the damage sustained is, as the testimony discloses, directly referable to the stiffness of the ship, which rendered her unable properly to ride those storms. Being bound on *such* a voyage, she should be more carefully laden than for one where storms are less expected. That is what was meant by the Supreme Court when it said the ship must be "really fit to undergo *the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage".* Accordingly that Court in the case of *The Edwin I. Morrison,* 153 U. S. 211, referring to a finding of the lower Court of weather conditions quite as bad as in the case at bar (See Appendix I post), said:

> "We do not understand from the findings that the severity of the weather encountered by the Morrison was anything *more than was to be expected upon a voyage such as this*, down that coast and in the winter season, *or that she was subjected to any greater danger than a vessel so heavily loaded, and with a hard cargo, might have anticipated under the circumstances.*"

The parallel in conditions with the case at bar cannot escape notice.

In the same connection (the above quotation being interpolated at the point now indicated by asterisks) that Court said:

> "Perils of the sea were excepted from the charter party, *but the burden of proof was on the respondents to show that the vessel was in good condition and suitable for the voyage* at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence or one of their servants contributed (citing cases). It was for them to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies not reasonably to have been anticipated. * * *
>
> "The especial peril which seemed at one time to have threatened her safety was directly attributable to the water taken aboard through the uncovered bilge pump hole, which rose from eighteen inches about 5 A. M. to seven feet at 9 A. M., so that she was necessarily sinking deeper and deeper, while the absorption of the guano added to the dead weight, and increased the danger of her going down."

The cap and plate above referred to, which was washed away in the storm, corresponds to the opening of our seams through the straining of the ship. The ship was held liable, and the decision is a striking illustration of the principle laid down in *The Portsmouth* already cited. See also *The Aggi,* 93 Fed. 484, Syllabus 3.

Hence, we say, if the "Musselcrag" was not properly laden with reference to storms off the Horn, then, *notwithstanding the stormy weather,* in the language of *The Portsmouth,* 9 Wall. 682,

> "the jettison must be attributed to that fault or breach of contract, *rather than to the sea peril, though that may also be present and enter into the case.*"

The Burden of Proof.—One word more, with respect to the argument of appellant (brief, pp. 20, et seq.) concerning the burden of proof. Though we do not think, under the facts in the case at bar, the question is of much importance, we do not desire to forego any advantage properly belonging to us under the principle. We shall presently see that this vessel showed her weakness not, as in the case relied on by appellant, after "for a considerable time, she had encountered such perils and shown herself staunch and strong", but on the contrary, before she had ever reached the Horn, and again in the very first breeze they had off the Horn, thus creating a legal presumption, of unseaworthiness,

In addition to this presumption, the testimony of her unseaworthiness is direct and affirmative.

Nevertheless, we contend it is error to say that the burden of proof is on appellee. In the above quotation from *The Edwin I. Morrison* the statement, without reservation, will be noticed, that the burden of proof is on the ship, and, in the subsequent case of *Martin v. Southwark,* 191 U. S. 1, 15, 16, the rule is, under the authority of the above case, expressly reaffirmed, notwithstanding the provisions of the Harter Act, it being said:

> "But whether fault can be affirmatively established in this respect, it is not necessary to determine. The burden was upon the owner to show, by making proper and reasonable tests, that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried; and if by the failure to adopt such tests and to furnish such proofs, the question of the ship's efficiency is left in doubt, that doubt must be resolved against the shipowner and in favor of the shipper."

In view of this language, we scarcely feel that the remarks of Justice Gray in *The Wilderoft,* 130 Fed. 528, based upon a parenthetical phrase in *The Chattahooche,* ~~is~~ are justified. Furthermore, they were obiter, for the facts of the case did not call for any application of the rule, because there the claimant *did* produce both "direct and circumstantial evidence" of seaworthiness "and there was no controverting testimony produced by the libelant" (p. 528).

With these preliminary considerations, we come to the question:

Was the Musselcrag in Fact Really fit to Undergo the Perils of the Sea, and other Incidental Risks to Which She Must be Exposed in the Course of the Voyage?

We begin with the admitted fact that the vessel was "naturally a very stiff ship"; (Johnson, Master, p. 54).

We have also admitted ~~the~~ fact that cement is a heavy, compact cargo, and unless properly distributed, will in itself make the vessel too stiff for safe navigation. As said by Milne,—"Cement is a very bad cargo for a vessel to roll with" (Milne, p 29).

Action of Ship Before Reaching the Horn.—Before the vessel struck the Horn, she showed, in the manner of her straining, indications of bad stowage. With very ordinary weather she is found to be rolling heavily and straining sufficiently to cause her seams to start. This opening of the seams before reaching the Horn is attempted to be explained by the suggestion that it is the result of contraction due to the heat in the tropics, but the position of the vessel at the time, as well as her conduct, evidenced by the log, indicates that this is not the case (Record p. 110). For instance,on August 2nd, before she reached the tropics, her putty broke out on the poop (p. 33). This could only be due to the working of

the ship. Then on September 17th, we find the ship rolling violently, and the next day we find the carpenter caulking the main decks, and the hands below securing cargo loose fore and between-decks. (See Log attached.) Up to this time Milne testifies that they had "experienced no bad weather, but that the ship rolled pretty heavily", adding in explanation, "but nothing particular *with the cargo she had in*" (Milne, pp. 28-29), thus recognizing that her heavy rolling was due to the cargo. And Lawson says she had "fine weather all the time" (pp. 34-35),

While Milne maintains that the cement was high enough in the ship, he is still unable to say why the cement caused her to roll so heavily (Milne, p. 29). That discrepancy is, however, explained by the fact that while he would observe the action of rolling, being a carpenter, he knows nothing of loading a ship or her navigation, and so admits (pp. 32-33).

The master admits that the *weight* of the cargo has nothing to do with her stiffness. *That* depends upon the nature of the cargo, *and the manner in which she is stowed* (Johnston, p. 69).

On September 29th we find an entry in the log that the seams in the fore deck were leaking *through straining,* and Farraday, the second mate, is compelled to admit that she rolled and strained several times, "but not very bad *like off the Horn*".

Q. SHE ROLLED AND STRAINED SUFFICIENT TO OPEN HER SEAMS BEFORE SHE GOT AROUND THE HORN?

A. YES SIR, BEFORE SHE GOT DOWN THERE. THERE WAS OIL AND SOMETHING ELSE PUT ON THE SEAMS.

Q. THAT CAME FROM HER STRAINING AND ROLLING?

A. YES SIR.

(Farraday, p. 44.)

This action of the ship is thus a silent witness of her improper lading, sufficient without the direct testimony of Captain Quayle, who is asked:

Q. Is there anything in the log-book that would indicate to your mind that the vessel was unusually stiff from the actions of the vessel as described in the log-book?

A. Yes, by entries in this log-book, even before she gets to the Horn, in what we call moderate latitudes, she is described as laborsome and rolling heavy under normal conditions.

Q. And what would that indicate to your mind as an experienced mariner, regarding her lading?

A. The ship was too stiffly laden. By the entries in the log-book the master himself most likely thought so, as he was lifting some cargo out of the lower hold into between-decks, and trying to rectify some of its laborsomeness. (Record pp. 107-108.)

The First Breeze off the Horn.—*The next day after the first breeze* they had off the Horn, the carpenter went down and found the decks weeping (Milne, p. 30). Then for about a week he could not go down, and when he did go again, they were worse (Milne, p. 30).

Whatever may be said about bad weather experienced around the Horn, this starting of the decks in the *very first breeze* she struck, indicates that she was in no condition to meet the weather *ordinarily to be expected off the Horn.* One might attribute the damaged condition of the vessel to a peril of the sea, if she *began* to give away *after long and continued stress of weather,* but when we find her seams opening in good weather, before she reaches the Horn, and weeping after the very first breeze she strikes off the Horn, we are convinced that she is not seaworthy. These conditions, without further comment, are a complete answer to appellant's argument on pp. 21-22 of his brief, and prove his authorities not only inapplicable, but create a presumption of unseaworthiness under the rule applicable to vessels that leak without sufficient cause.

After her experience on her way to the Horn, we are not surprised at her unusual behavior at the Horn in laboring about very heavily.

Q. Did she roll very heavily?

A. Yes sir, she rolled something very bad.

Q. And strained very hard?

A. Yes sir.

Q. She rolled and strained before you got down to Cape Horn?

A. No sir, she was all right until we got down there.

Q. Did she not roll and strain any before you got to Cape Horn?

A. Not a great lot, no sir; she was all right, like any ordinary ship.

Q. I find an entry in the Log on September 29th: "Find seams in fore deck leaking, put on tar and oil on seams through straining." Do you remember anything about that?

A. We had several gales, not very hard. Of course she rolled and strained several times but not very bad, like off the Horn.

Q. SHE ROLLED AND STRAINED SUFFICIENT TO OPEN HER SEAMS BEFORE SHE GOT AROUND THE HORN?

A. YES SIR, BEFORE SHE GOT DOWN THERE THERE WAS OIL AND SOMETHING ELSE PUT ON THE SEAMS.

Q. THAT CAME FROM HER STRAINING AND ROLLING?

A. YES SIR.

(pp. 43-44.)

Shifted Cargo.—An Admission of Improper Stowage.— The master, also, must have recognized that his ship was not perfectly laden, because before he got to the Horn he shifted the cargo, and though it is contended that this was confined to some cases of bottles, Farraday, the mate, says that they were shifted to make clear way for the cement. He would not, however, be sure that they did not shift any cement before they got to the Horn (Farraday, p. 46).

On October 12th, however, they did shift cement further aft, *and higher up in the ship, to ease the*

pitching and straining (Farraday, pp. 47-48) (Entry in Log, Oct. 12th).

This was *thirteen days* before they found it necessary to jettison cargo. At that time they raised it *as much as they could under the circumstances.* It eased her straining some, but was not sufficient to keep her from still straining hard (Farraday, p. 48).

This, in itself, would seem to be a physical demonstration of the fact that the vessel was laden with the center of gravity too low. *It indicated the cause of the vessel's behavior, and that the remedy was in the right direction, but insufficient in amount.*

Water in Hold Would Ease Her Straining Instead of Increasing it. — While *it is admitted that she labored too much after her decks opened,* suggestion is made that this is due to the entrance of water into the hold, but a moment's reflection will indicate that such would not be the effect of the water entering into the hold, and hence *the admission that she then labored too much, is in effect an admission of her previous unseaworthiness.*

It will be remembered that the cargo was stowed both in the between-decks and the lower hold. The water going down there would strike the cargo in the between-decks first. The cargo was of a nature that absorbed the water. As said by the master (p. 60): "The water *was absorbed by the cement,* and *did not* bring up in the bilge. There never was

more than two inches of water in the well." And the mate also calls attention to the fact (p. 45) that it was "*the top of the cement that was damp*". Nevertheless, when he went down below, off the Horn, he found the water coming through in such large quantities as to cause the vessel to sink deep in the water.

Under these conditions, no matter how deeply down the dampness penetrated the cargo, the larger quantity, if not the bulk of the incoming water *would be retained in the between decks and upper portion of the lower hold.* These large quantities of water remaining in the between decks would therefore *raise the weight* to the between deck, and tend to restore that equilibrium which should have been attained in the first place by placing a larger proportion of the cargo in the between decks.

Direct Proof of Improper Stowage.—The master testifies that "*the ship was naturally a beamy ship and a stiff ship," and in order to keep her as lively as possible, they began raising her cargo at the 6th tier,* instead of at the 8th tier, as is usual in stowing cargoes at Antwerp. (P. 54.)

He is asked to explain the difference between raising the cargo and not raising it, and says: "*If we did not raise it the barrels would be stowed bilge and cantling.* When you raise the cargo you put inch pieces of board over the 6th tier, which would raise the next tier, and so on" (p. 53). He thus

recognizes that if the vessel was in fact laden "bilge and cuntling" she was improperly laden and too stiff. His testimony that the tiers were raised is, however, directly contradicted by a disinterested witness, with equal, if not better, means of information.

Burk, the stevedore who unloaded the cargo at San Francisco, and has no interest in this controversy, says that the cargo was *not* raised in manner indicated, *"but was set bilge and cuntling"*. It was raised about a foot from the bottom of the ship, and was a solid bulk of cement from the between-decks down; "there was a few boards scattered along the *main hatch,* and barrels were set on top of them, but from there aft, to both ends of the ship, there was nothing but cement, and it was set bilge and cuntling" (Testimony, p. 84). These boards were in the 4th tier below the between-decks, and were old pieces of lining boards, and were not in the body of the ship, but only in the main hatch (p. 85).

If this be true—and, because the witness was without interest in the controversy, it should be accepted in preference to that of the master—according to the master's own idea of what is *proper lading, this vessel was in fact improperly laden at the time she left Antwerp.*

The testimony of the two men cannot be reconciled, and the one is interested to discharge himself from the accusation of negligence, while the

other has absolutely no interest in the matter whatsoever.

Experts say Cargo Improperly Distributed. — The master states that the vessel was laden with 2350 tons in lower hold, and 928 tons in the between decks (pp. 54-55).

This, in the opinion of the experts, is improper lading and would cause the vessel to damage herself and open her seams. (*Wilson,* pp. 92-93; *Quayle,* pp. 104-106; *Steele,* p. 122.

There is a deposition in evidence from a stevedore at Antwerp, who did not personally direct the details of the work, and who answers the question (Interrogatory 6) "What knowledge had you of the method in which she was loaded, that is, as to the character and quantity of cargo which was placed in the different parts of the vessel?—that he does not know. He is then asked (Interrogatory 9), "If you know the way in which the ship was loaded, please state whether or not in your opinion she was properly loaded for the voyage from Antwerp to California?"—"*As far as I can recollect* after three years I *think* this ship was properly loaded, and in the usual conditions". But he does not know if she be a stiff or cranky ship, nor the number of tons in her hold or between-decks, nor any other details necessary to form a judgment, and his opinion is a doubtful one, based upon what appears to be a dim recollection. It certainly cannot have much weight (pp. 74-75).

An attempt was made by the libelant to get the testimony of the stevedore who did the actual work of lading, but when the commission arrived he was dead.

Damage Caused by Straining.—Of course the damage to the cargo was due to this straining of the ship. "That opened the seams." "The more the ship strained the more the deck strained" (Master, pp. 60-61), and accordingly we find the entry in the log October 26th: "Found cargo saturated with water *through excessive straining of the ship and* decks." Captain Quayle also said: "Straining opens the seams and makes her leak" (p. 106).

From the foregoing, it affirmatively appears that the vessel was by reason of her improper lading unseaworthy for the voyage in question, *when she started* and at all times thereafter and until the damage was done. Further, that the damage resulted directly therefrom. The language of the District Court used in the decision, convinces us that such must also have been his opinion, had his attention not been diverted from the issue, by the error already referred to with respect to the rule by which the liability was to be determined.

Restowage not in the Ordinary Course.—On page 27 of his brief, counsel quotes from §18 of *Carver on Car. by Sea,* to the effect that a ship may be seaworthy when she sails, although she could not safely

perform the voyage in the precise state in which she sailed, the illustration being that of hatches being off or port holes open, which, during the voyage would *in the ordinary course be closed when necessary,* but that is not analogous to the present case, nor is the suggestion of such an anology warranted by the section cited, for in the same section it is said:

> "Also the cargo taken must be a safe cargo for such a voyage as may be reasonably expected, *and it must be stowed so as not to be a source of danger.* In Kopitoff v. Wilson, one of a number of armour plates stowed in the ship broke loose during bad weather and went through her side, so that she sank. The jury found that *she was not reasonably fit to encounter the ordinary perils that might be expected on the voyage, owing to the manner of stowing the plates;* and that the loss was caused by that unfitness. Held, that the shipowner was liable for the value of the plates."

So, too, the analogy sought to be established is lost in the fact that restowage of cargo on the voyage is not an act to be performed "in the ordinary course," "after sailing." It is rather extraordinary, and in order that the ship may have started seaworthy as to stowage, she must, as above indicated, have been so stowed as to be "reasonably fit to encounter the ordinary perils that might be expected on the voyage", among which, it must be admitted that severe storms off the Horn are not the least important.

Charterers' Stevedore.—Some suggestion has been made respecting the vessel having been laden by the charterers' stevedore. The charter-party, however, provides, that "It is agreed that the lumpers and stevedores shall be under the direction of the master, *and the owners responsible for all risks of loading and stowage.*" (Test. p. 130.) The master testified that the stevedores were employed by him, though selected by the charterers' agent, and the stowage was done under his supervision. (Record, p. 73.)

Under these circumstances, the ship is responsible for the bad stowage, if there be any.

The Sloga, 22 Fed. Cas. 346;
The Whitlieburn, 89 Fed. 527.

The Log.—Appellant has appended to his brief, excerpts from the log. As they are not sufficiently full to answer our purpose, we file herewith a complete copy of the remarks in the log covering the dates included in said excerpts.

II.

THE SHIP IS LIABLE BECAUSE OF THE FAILURE OF THE MASTER TO REPAIR HIS DAMAGE AT THE FALKLAND ISLANDS INSTEAD OF RUNNING TO AUSTRALIA WITH HIS DECKS IN THE VERY BAD CONDITION IN WHICH HE FOUND THEM AFTER ABANDONING HIS ATTEMPT TO ROUND THE HORN.

That the damage suffered off the Horn was very severe and rendered the vessel unseaworthy with respect to the protection of her cargo from water, must be admitted.

David Milne testifies that "When the decks commenced to leak they opened out and you could see the seams nearly, some of them, not all of them; one here and another there, right along the decks." The cement along the water way "was cracked in the way of the stanchions". The starboard bulwarks "were all stove in and the port ones also". (P. 25.)

Q. Where the bulwarks gave way, state whether or not water could get in?

A. Where the fastenings of the stanchions go through the plates.

Q. Could water get in there?

A. Yes, sir.

* * * * * * *

"A lot of rivets in the stanchions were gone; I think 9 stanchions in the between-decks and 10 in the lower hold where the rivets were all gone". * * * (P. 26.)

Speaking of the deck beams, he says: "The one before the foremast, the stanchion was gone from the between deck beam, that is, the stanchion before the foremast."

Q. What effect had that?

A. The deck rose up.

Q. It raised the deck, did it?

A. Yes, sir.

* * * * * * *

"The stanchion being gone that would allow the deck to warp."

Q. What would the seams do?

A. They would open (pp. 26-27).

They stopped at Sydney to make these repairs; they were of such a nature they could not make them on the voyage.

Q. *I suppose you became aware of that fact when you were off Cape Horn?*

A. *Yes, sir.*

Q. They were of such a nature that you could not repair them on the voyage?

A. No, sir, unless you put into port." (P. 32.)

Johnson, the master testifies to the same effect. Of the damage, he says, among other things, they "twisted the bulwarks on both sides, started the bulwark stanchions on both sides, cracking the cement around them," (p. 59) and that this had the effect to strain the decks and open the seams. (P. 60.)

Q. Do you know whether or not water got into

the ship by reason of the cracking of the cement near the waterways and the fastening of the stanchions loosening?

A. Yes, sir, you could trace the water down the ship's sides now. Captain Metcalf saw that when he was on the ship at the dock here. (P. 60.)

Speaking of 9 stanchions in the between-decks loose at the head, and 10 in the lower hold, he is asked:

Q. What effect did that injury at the time that it happened, have upon the stability of the decks?

A. It would leave the decks free to move. There is no doubt their being carried away increased the opening of the seams. (P. 65.)

* * * * * * *

Q. *This cracked condition of the cement, what would that indicate to you with reference to the working of the sides of the vessel?*

A. *It indicated in all probability that the stanchions were started; that there had been a movement.*

Q. *You noticed that while you were off the Horn, did you not?*

A. *Yes, sir.* (P. 68.)

Notwithstanding this, the master started upon a two months' voyage from Cape Horn to Sydney (Milne, p. 33), where they stopped to repair the damage instead of, for that purpose, putting into the Falkland Islands but a few miles distant, with a fair wind (pp. 111, 124), and almost in the line of their run to Sydney.

During this run to Sydney they had an exceptionally heavy passage. Milne testifies:

Q. You had some heavy weather between Cape Horn and Sydney?

A. Yes, all the way nearly.

Q. All the way, nearly?

A. Yes, sir.

Q. Decks full of water, I suppose?

A. Yes, decks full of water. (Milne, p. 31; Johnson, p. 68.)

Under these circumstances, the master was not exercising ordinary human foresight and prudence in the care and custody of his cargo. Certainly in carrying a perishable cargo two months, under open decks almost constantly covered with water, he must have known that his cargo was receiving further and additional damage.

The Legal Duty Under the Circumstances.—With respect to the duty of the master under such circumstances, the rule is laid down by *Kent,* 3 Comm. 213, in the following language:

> "In the course of the voyage the master is bound to take all possible *care of the cargo,* and he is responsible for every injury which might have been prevented by human foresight and prudence and competent naval skill. He is chargeable with the most exact diligence."

This language is quoted with approval by Judge Hoffmann in the case of *Speyer v. Mary Belle Roberts,* 2 Sawy. 1.

It is the rule that if the damage arose by peril of the sea, the master is bound to use every means shown to have been available *to preserve the cargo from further damage*, and in the case of *The Sloga,* Fed. Cas. 12,955, the Court accordingly laid down the principle as a rule of law "too well settled to require any extended comment", that

> "The ship does not excuse damage to the cargo *as caused by peril of the sea,* if the damage could have been prevented notwithstanding the peril encountered, by the utmost exertions of the master and crew and the full use of all the resources at the command of the ship." (p. 347.)

In that case a damaged cargo of sugar was delivered to libelants, and among other defenses the claimant set up a peril of the sea. Severe weather, as bad indeed as anything disclosed in the case at bar, was shown, and described in such graphic language as: "Awful gale breaks out with such a heavy sea that the deck is filled with water, washing away kitchen, fowl baskets, etc. * * * A furious gale and deck continuously under water. About 2 P. M. the wind nearly oversets the vessel, rendering her steerless." And the captain testifies that the first gale lasted about 24 hours, so that they had to lay to, losing some sails, the kitchen and some of the bulwarks. The mate testifies that during the gale she was on her beam ends ten or fifteen minutes, and that the carrying away of her sails righted her.

In passing, it will be observed that *notwithstanding* this very severe weather, the vessel *did not open her decks.*

In summing up, the Court said:

> "Upon the whole testimony I do not think that I should be warranted in holding that the ship has shown that she encountered such perils of the sea adequate to account for the damage, *and uncontrollable by the resources at the command of the ship*, as will account for the damage, and throw upon the libelants the burden of making out a further case of negligence. In this posture of the case it is not for the libelants to prove affirmatively how it was that the water rose in the ship so as to submerge the cargo. *Negligence of the ship is presumed from the fact that the damage was done, and that the means of preventing it were at hand.*"

The decision concludes with the observation:

> "On the ground, therefore, that the ship has failed to show that the damage to the cargo was caused by a peril of the sea, and that it is proved that it was caused, *in whole or in large part,* by insufficient stowage and dunnage, there must be a decree for the libelants."

The matter was accordingly referred to the commissioner to compute the damages.

The case of *The Shand,* Fed. Cas. 12,702, referred to in the above case of the *"Sloga",* is a leading case upon the subject in this country. In that case a cargo of sugar was delivered in a damaged condition. The defense was that the ship sprung a leak on the voyage by reason of violent storms and

stress of weather, and that the damage was the result of this leak. The vessel had experienced very bad weather, and was compelled to jettison part of her cargo, and the Court found the proof sufficient to show that the circumstances of danger under which part of the cargo was jettisoned, was such as to justify the act. That it was done under reasonable apprehension on the part of the master that the ship might founder, and for the purpose of checking the leak and for the safety of all concerned. That therefore that part of the defense was clearly made out.

When the vessel arrived at quarantine in New York the crew was exhausted with constant working at the pumps, and a gang of men was telegraphed for, and after their arrival, at the first sounding they found nearly 9 feet of water, on the second sounding, within an inch of 10 feet of water in the hold, but the men were able to control the leak with the ship's pumps. As soon as possible after the arrival of the vessel at the pier, a steam pump was put to work and worked continuously until the next morning, when the pump sucked. The pumping then stopped for some time, and during the interval that no pumping was done, the water again rose in the vessel higher than it had ever been before. After the discovery was made of this leak, the steam pump was started again and the ship pumped out and thereafter kept pumped out.

For the loss occasioned by these two floodings, the libelants claim damages, and the claimants insist that it was to be attributed to the same peril that had caused the original damage, that the leak in the ship "was a continuing peril", and the Court said:

> "Assuming that the leak in this ship was caused by a peril of the sea, and that this loss now in question resulted from the same leak, the question is, what is the duty of the ship *in protecting the cargo against a peril which threatens its safety,* or, which is the same thing, against damage *which threatens to result from an injury to the ship caused by a peril of the sea.* The duty of the ship to the owner of the cargo, in this respect, has been so *conclusively determined in this country*, that it is necessary only to quote the language of the Supreme Court in the case of *The Niagara v. Cordes,* 21 How. 7."

We will not undertake to give the whole quotation from the Supreme Court decision, but content ourselves with so much as we think illustrates the principle we wish to elucidate. Speaking of the duties of the carrier by water to his cargo after injury from excepted perils, the Supreme Court says:

> "Such disasters are of frequent occurrence along the seacoast in certain seasons of the year, as well as on the Lakes, and it cannot be admitted for a moment that the duties and liabilities of a carrier or master are varied or in any manner lessened by the happening of such an event. *Safe custody* is as much the duty of the carrier as conveyance and delivery, and when he is unable to carry the goods forward to their places of destination, from causes which he did not

produce, and over which he has no control, as by the stranding of the vessel, *he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury that might have been prevented by human foresight, skill and prudence.*" (P. 1158.)

In the course of his observation upon this subject, the District Court says:

"Such preservation and protection are of the very substance of the ship's contract, with the cargo-owner, and therefore what the master does in that regard is done for the ship, and there is no necessity for creating, by a legal fiction, any new agency to authorize or require him to do this duty toward the cargo." (P. 1159.)

Concerning the contention that after the ship is wrecked or stranded the master was only liable for reasonable diligence and care, the Supreme Court further said:

"Judge Story refused to sanction the doctrine, and held that his obligation, liabilities and duties as a common carrier still continued, and that he was bound to show that no human diligence, skill or care could save the property from being lost by the disaster. Anything short of that requirement would be inconsistent with the nature of the original undertaking and the meaning of the contract as universally understood in courts of justice." (P. 1158.)

The District Court concludes that the cases

"Are conclusive to the point that the master was bound by the contract of affreightment upon the happening of the disaster which befell his ship, the springing of the leak, to em-

> ploy all possible means within his reach, to protect the goods against the danger which the leak threatened them with. * * * Such preservation and protection are of the very substance of the ship's contract with the cargo owner", etc. (P. 1159.)

The Court suggests in that case that the English cases show that the English Courts do not hold the ship to so strict a liability as our courts for preventing damage to cargo from the effect of a threatened peril, but not only does the District Judge point out the error in that conclusion, but we shall also presently see that in this respect the American law is controlling because of the provision of the Harter Act. See *Botany Worsted Mill Co. v. Knott,* hereafter cited.

This case is also instructive upon the question of the amount of proof necessary to establish the case for libelants, and announces the principle that notwithstanding the ship may show that the damage resulted from a sea peril, if the evidence also shows *that there was available to the master means of avoiding the damage which threatened the goods, it is sufficient to charge the ship.*

> "The proof of that, and the further admitted or proved circumstance that the danger was not averted, is evidence from which the presumption of negligence in the use of those means at once arises. It is, unexplained, sufficient proof of negligence. The presumption is of the same general character as that presumption of negligence which arises in the first instance upon proof of the failure to deliver the goods in an undamaged condition." (pp. 1160-1161.)

Applying these principles to the case at bar, we have, if it be admitted that the damage to the ship was the result of a sea peril instead of unseaworthiness, a ship with open decks and the means at hand to repair them, of which means the master does not avail himself, but proceeds on a two months' tempestuous voyage before attempting to remedy the injury. It will not be contended that human foresight, skill and prudence were exerted in this respect, but must be admitted that the master in so doing failed in the *proper care and custody of the cargo.*

The principle we contend for was also recognized by the Supreme Court in the case of

The Portsmouth, 9 Wall. 682, 7.

where a vessel was stranded and unnecessarily jettisoned part of her cargo, and the Court said:

> "Were it necessary, it would be easy to show that the conduct of the master after the vessel was stranded was entirely unjustifiable. It was his duty even then to take all possible care of the cargo. He was bound to the utmost exertion to save it. Losses arising from dangers of navigation, within the meaning of the exception in the bill of lading, are such only as happen *in spite of the best human exertions,* which cannot be prevented by human skill and prudence. *The Niagara v. Cordes,* cited above."

English Cases.—Although, as suggested by the Court in *The Shand,* the English cases be less strict than the American in the degree of care required by the

master in protecting the cargo from a threatened peril, yet they are sufficiently strong to charge the vessel under the facts in the case at bar.

The Rona, 5 Asp. Mar. Law Cas., New Series, 259. (1884.)

The *Rona,* a wooden vessel, under a charter from the port of New York to London, with a cargo of grain and flour, left her moorings and was towed down the New York River, and on her way stranded on the Craven Shoal, which is about 10 miles below New York. A tug towed at her for an hour and three-quarters before she was got off. During that time her decks and waterways were much strained, and she was then found to be making 5 inches of water an hour. But the master did not examine her, or cause any repairs or caulking to be done, but proceeded on the voyage and encountered very severe weather. On her arrival in London, the flour of plaintiff, which was immediately beneath the deck, was found to have been damaged by the sea water having made its way through the deck.

Under these circumstances, it was held that it was *the duty of the master to have returned to port and repaired his ship before proceeding upon the voyage,* and having failed to do so, the ship was liable for the whole damage, unless the master was able to distinguish what portion of the damage did not arise from the negligence which had thus been established against him.

It was further distinctly affirmed that the Court *would not assent* to the proposition that the liability of the owner depends upon *the honesty of the belief of the Captain that what he proposes to do is the right thing.*

The decision touches upon many questions of interest in the present controversy, and will well repay a perusal. How nearly parallel in material facts it is to the case at bar will be indicated by the following language of the Court, where it is said:

> "We are advised that one obvious thing which he might have done, was this, that when he saw, as I am assuming that he did, that the vessel had been so strained and had received such a shock that her waterways and decks were strained, and that in some way or other she was making five inches of water per hour, that ought to have indicated that he should, at least, have taken the precaution of having the water ways and the decks caulked for the purpose of preventing the water going through, as it was able to do if she encountered any bad weather, such as she did encounter at that season of the year.
>
> "There is, therefore, in the judgment of those who assist us, one plain element of negligence which would, if it had not been committed, from the precaution which has been mentioned, have had a tendency to prevent the saturation of the deck with water and the penetration of water into the hold."

In this connection it will be borne in mind that in the case at bar there is but one interest to be considered, as the cargo is a single con-

signment. It is further admitted that "all the facilities necessary for effecting repair * * * could have been had at Port Stanley in the Falkland Islands"; (p. 148) yet the master squared away for a port of repairs several thousand miles distant. Hence, delay and expense are elements entering in the determination of the question only so far as they tend to *convict* the master, for the course he took *increased* both the delay and the expense by the difference in time and expense between that required to go around the globe, and that required, after having repaired at the Falklands, in returning the 360 miles to the point of departure off the Horn, thence to continue his voyage.

We notice appellant's suggestion (Brief p. 7) of probable "further injury to cargo" and "enormous expense" if repairs were made at the Falklands, but there is no evidence of such facts further than the statement in the supplemental testimony of the master, wherein he attempts to avoid the stipulated facts above referred to concerning the facilities for repair at the Falklands. Neither does it appear that this "enormous expense" can exceed the "enormous expense" of a trip around the world requiring six months in excess of the time required for an ordinary voyage. (pp. 65-66.)

Consider also, that during two months of said additional voyage, her decks were open, whereby "further injury to the cargo" was certain, while

on the other hand, no reason is given for "further injury to the cargo" in the Falklands as a port of distress that would not apply equally well to Sydney as a port of distress.

Further considering the English cases, we have

Worms v. Storey, 11 Exch. 427 (1855).

Vessel was to proceed to Cardiff and load with coal, and then take coal to Havre.

> Declaration: "After the commencement of the voyage, the said vessel was greatly damaged by the dangers and accidents of the seas, and the defendant had notice that the said vessel was then unseaworthy, and the said vessel was then in a place where she could and might and ought to have been repaired, before she proceeded on her said voyage, of which the defendant then had notice, yet the defendant did not cause the said vessel to be repaired before she proceeded on her said voyage, and the defendant carelessly and negligently caused the said vessel to proceed on the said voyage with the said coals on board, in an unseaworthy state and condition. In consequence a large quantity of coal had to be thrown overboard."

Held—on argument of demurrer:

> "It is clear to my mind that the breach is sufficient. Under a charter-party containing such an exception, if the vessel sails in a seaworthy state, and in the course of the voyage is damaged by perils of the sea, the owner is not bound to repair it, but if he does not choose to repair, he ought not to go to sea with the vessel in an unseaworthy state, and so cause a loss of the cargo. He ought either to repair it or stop. * * * In order to make out negli-

> gence here it must be proved that he proceeded with the vessel in such an unseaworthy state that he was obliged to throw the goods overboard. If so, the loss was the consequence of the wrongful and negligent act of the defendant, and for that he is responsible."

In conclusion, we suggest that the facts in the case at bar are very much stronger in favor of putting into Port Stanley than were those in the case of *The Iroquois,* where this Court held the ship liable. Here the vessel actually turned back with Port Stanley in her return course but a very few miles distant, and the damage to be avoided was damage to the cargo—almost the first concern of the ship. Whatever, therefore, may be said with reference to the duty of the master to put into Port Stanley under the facts in *The Iroquois* case, the facts in this case leave no room for argument.

The Master's Judgment as a Guide.—It is contended by appellant that "the ship's change of course to the eastward and her failure to put into the Falkland Islands as a port of refuge, were matters which must be determined by the master in the exercise of a conscientious and prudent judgment. For an error in his action, if events afterwards should prove there was one, the owner cannot be held liable." (pp. 6-7.)

In support of the contention a case is cited from the Maine Reports. The following expression of the Supreme Court upon the subject, should, how-

ever, set the question at rest. After referring to the rule that negligence must be determined upon the facts as they appeared at the time, and not by and from actual consequences which were not to be apprehended by a prudent and competent man, the Court says:

> "But it is a mistake to say, as the petitioner does, that if a man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury, or laid down by the Court, is an external standard, and takes no account of the personal equation of the man concerned. The notion that it 'should be co-extensive with the judgment of each individual,' was exploded, if it needed exploding, by Chief Justice Tindal in *Vaughan v. Menlove,* 3 Bing. N. C. 468-475. And since then at least, there should have been no doubt about the law."
>
> *Ocean Steam Nav. Co. v. Aitken,* Supreme Court Advance sheets, April 1, 1905, p. 318.
>
> See, also, *Compania, etc., v. Brauer,* 168 U. S. 104.

In this connection it must not be overlooked that, in this case, "the facts as they appeared at the time" would have warned any prudent man to seek the nearest port for repair. With the knowledge that his decks were open and leaking, a perishable cargo underneath, he cannot claim to have exercised "a conscientious and prudent judgment". In the *Rona* the Court did not think it prudent.

The Master's Deposition.—In the face of the positive testimony (referred to on pp. ante), the following statement is made in appellant's brief, p. 4:

"Inasmuch as the libel had charged no fault in the captain of the 'Musselcrag' in this respect, and the master had not been examined or *cross-examined* on the subject, and inasmuch as there was nothing in the evidence (*as we thought*) *showing the knowledge of a probable injury to cargo* such as would demand that the master turn back on his voyage at that time, etc. * * * we submitted the cause without further examination of the master, he having long before left the jurisdiction. After the decision his evidence was taken for use on appeal. It shows clearly three things: 1st, *His ignorance that the cargo was in a seriously damaged condition at the time he bore away for Australia;* 2nd, *The fact that the condition of his ship did not require such action,*" etc.

We leave it to the Court in view of the foregoing testimony, and the testimony regarding the condition of the cargo and leakage preceding the jettison [not to speak of the jettison itself and reasons assigned therefor (pp. 66-67-68)] whether or not it be true that the captain was ignorant that the cargo was in a seriously damaged condition at such time, as well as whether or not the condition of the ship did require such action.

Regarding the claim that the libel charged no

fault in not returning to Port Stanley for repairs, and that the master was not cross-examined thereon, we must, with all deference to counsel, say that the suggestion is a weak attempt to excuse himself for trying his case on a wrong theory. The libel is in the usual form, the captain was cross examined as to his position at the time of putting back (p. 70), his knowledge of the damage to his ship and cargo, the nature of the weather he encountered to Australia, the likelihood of additional damage to the cargo on said voyage, *why* he made repairs in Sydney, whether it was reasonable to expect any worse weather across the Pacific than that encountered running to Sydney (p. 71)—all pointing directly to the contention that he should have put into a nearer port of distress.

That counsel then appreciated the purpose of that examination, is evidenced by his re-direct question:

"Q. After beginning to make your easterly course, were you in a condition to do anything towards improving your decks? (p. 72.)

More pointedly still, *a year and a half before the trial* we informed counsel that we desired to take testimony respecting the facility for repairs at Port Stanley, which resulted in the stipulation (Record p. 148) that "it shall be taken as a fact admitted to be true that *all the facilities necessary* for effecting repair of the injuries to the 'Musselcrag' occasioned during her voyage up to the time she reached about

the latitude of the Falkland Islands, could have been had at Port Stanley in the said Islands."

Under these circumstances it is not fair to contend that counsel was not fully advised of our position over a year and a half before the trial in the lower court—ample time to take any testimony he might have required. We think it must be confessed that the true explanation of his action in that respect lies in the single fact, taken from the above mentioned statement of his brief, that "inasmuch * * * as it seemed that any fault thus committed, if there was one, was 'a fault or error in the navigation or management of the ship', and within the protection of the Harter Act, we submitted the cause without further examination of the master, he having long before left the jurisdiction." (P. 4.)

This brings us to a consideration of the Harter Act.

III.

THE LOSS IS NOT A "LOSS RESULTING FROM FAULTS OR ERRORS IN NAVIGATION OR IN THE MANAGEMENT OF THE VESSEL".

1. We have seen from the foregoing decisions, that the ship's liability in this matter rests upon the failure of the master in the *care and custody of the cargo.* It is not the case where the master failed to make use of the appliances furnished by the

owner, but it is the failure of the master after his vessel had become unseaworthy, to do those things which it was incumbent upon the owner to do to render her seaworthy. To use an expression describing the difference between the duties of an agent, under the law of master and servant, to provide safe tools, and his duties in the use of those tools when provided, the shipmaster, in respect to the duties here required of him, is a vice-principal.

But the Harter Act makes a plain distinction between the negligence of the master in respect to the *care and cutody of the cargo,* and that in respect to the "management" of the ship. For a failure in the former respect, so far from excusing the ship, the Harter Act *emphasizes the liability* by enacting that any stipulation to relieve the owner from negligence in that regard *shall be void.* (§1.)

Section 3, relating to errors in navigation and management, must be read in connection with Sec. 1, and must be so construed as not to avoid or "contradict the evident and particular intent of the first section." This question of construction was carefully considered by Judge Brown of the Southern District of New York, and his reasoning and conclusion affirmed by the Circuit Court of Appeals and the Supreme Court of the United States. The matter is, therefore, beyond discussion.

Botany Worsted Mills v. Knott, 76 Fed. *585*, D. C.;

82 Fed. 471, C. C. A.;
179 U. S. 69, Sup. Ct.

In that case the vessel started on her voyage seaworthy, but in the discharge of cargo at way ports, her trim was changed so she became down by the head, thus causing drainage toward the stem and injuring cargo forward. It was contended that this was error in the "management" of the vessel under the Harter Act, but the Court held that it was negligence in the "stowage", which is embraced in the same section of the Act, and subject to the same conditions as "care and custody"; that

> "The evident intent is that ship and owner must answer for such damages. The general words of the third section, 'management of the vessel', cannot receive a construction which would contradict the evident and particular intent of the first section. The different parts of the same act must be construed harmoniously so far as possible. The scope of a general phrase must be restricted so as not to contradict the more particular provisions of other parts of the same act. And so here, since this damage arose through negligence in the particular mode of stowing and changing the loading of cargo, as the primary cause, though that cause became operative through its effect on the trim of the ship, this negligence in loading falls within the first section. The ship and owner must therefore answer for this damage, and the third section is inapplicable."

The Court further points out the difference between what may be considered as "management of the vessel" and what "care and custody of the

cargo", and in the course of those remarks, refers to the language of the Judges in the case of *the Glenochil*, saying, among other things:

> "It was further considered that the Harter Act is designed to '*prevent exemptions in the case of direct want of care in respect to the cargo*, and to permit exemption in respect to the faults primarily connected with the navigation or with the management of the vessel, and not with the cargo.'
>
> "In the same case, Sir Gorrell Barnes observes that it was a fault in the management of the vessel in doing something necessary for the safety of the ship herself; that in the first and third sections of the Harter Act 'there will be found a strong and marked contrast in the provisions which deal with the care of the cargo, and those which deal with the management of the ship herself; and that where the act done is done for the safety of the ship herself, and not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of said vessel.' " (pp. 584-5.)

The Supreme Court, in commenting upon this distinction, says:

> "The like distinction was recognized by this Court in the recent case of *The Silvia,* 171 U. S. 462." 179 U. S. 74.

We think we have made it sufficiently clear in the former part of this brief, that the failure to return to Port Stanley for repairs, was the failure to do an act necessary *for the protection of the*

cargo from damage which threatened to result from the injury to the ship caused by a peril of the sea.

The Shand, ante;
The Niagara v. Cordes, 21 How. 7.

The act thus required of him was, therefore, an act which should have been done primarily, if not entirely, for the protection of the cargo, and not at all for the safety of the ship. Hence it was not "management of the ship," within the meaning of the Act.

It follows that when appellant argues that "it is quite clear that the same rule must govern whether the ship is *so managed* that water goes through her decks, or that after it gets into the ship it is not pumped out", he befogs the issue. In the case of opendecks the ship is *not* "so managed" that water goes through her decks, but, we have as to the cargo, an *unseaworthy ship;* one that, having due regard to the care of her cargo, requires immediate repair. On the other hand, the case of pumping out, or of closing the port hole (as in the principle cases cited by appellant), the vessel is perfect in her appliances, and it is the mere improper use of those appliances that is at fault. When the true nature of the act here complained of is borne in mind the primary object of which is to preserve the cargo, we should have no difficulty in determining, in consonance with the decisions, that the Harter Act does not relieve appellant from liability.

Why American Cases Holding Strict Liability, Controlling.—We suggest on page ante that because of the Harter Act the rule of the strict accountability under the American cases controls, rather than the less strict rule of the English cases. As already suggested, Section 1 of the act emphasizes the American cases, by making void any stipulation relieving the ship from liability for loss resulting from negligence in the "care and custody" of the cargo. The statute thus approves the policy of the American law as laid down by the Courts making the ship an insurer in that connection. Hence the rule laid down in *Botany Worsted Mills v. Knott,* 76 Fed. 585, applies, viz:

> "Foreign law is administered only upon principles of comity. This cannot be allowed to subvert in our courts our own positive law, founded upon public policy, as respects contracts to be performed in part within our jurisdiction and in part upon the high seas."

In the Supreme Court it was pointed out that the language of the 1st section and that of the 3rd section of the Act differed with respect to the description of the voyage to which the act applied, and it was contended that the 1st section did not apply to a British ship on voyage from a foreign port to the United States. The Court held, however, that it did apply.

179 U. S. 75.

2. There is also a suggestion that the Harter Act might relieve the ship from responsibility for loss claimed by us to be due to her original stiffness and improper lading, it being said that the regulation of the trim of the ship is a part of the management of the ship, and hence within the Harter Act, where such regulation is done, or should be done primarily with reference to the ship for the benefit of the ship. (pp. 27-29.)

This, however, assumes that the ship *started seaworthy as to stowage*, and that she afterwards required to have her trim changed to meet different conditions. We have, however, already seen that in order to start seaworthy as to stowage, the vessel must be so stowed as to be *prepared to meet all kinds of weather that might reasonably be expected on that voyage,* and if the Court finds that she was not in fact seaworthy in this respect, no question of the Harter Act can arise.

As said by the Supreme Court in *Knott v. Botany Worsted Mills,* p. 74, quoting from the case of *The Ferro,* "mere stowage is an altogether different matter from the management of the vessel". * * * There is no such thing as stowing a vessel, bound on such a voyage with a homogeneous cargo, with the expectation that she shall be restowed en voyage to enable her to meet varying conditions of weather. Hence, the analogy of an open port hole, to be opened or closed as the weather demands en voyage, is inapplicable.

We respectfully submit that the judgment of the District Court should be reversed, and judgment ordered for libelant for the full amount of its damages.

NATHAN H. FRANK,
Proctor for Appellee.

APPENDIX I.

"XIII. The voyage began the 5th day of January, 1884, and the vessel actually got to sea on the 7th, when she encountered a strong northwest gale. The light sails were furled and the mainsail and foresail double reefed. The gale caused her to labor heavily and ship large quantities of water, some of which entered the cabin and reached the cargo. The vessel was driven out of her course and into the Gulf Stream. The gale moderated somewhat the latter part of the day, but the vessel still continued to roll heavily and shipped plenty of water. The pumps were attended to and the vessel was found to be making considerable water. The next day the gale continued, with a very heavy sea running, until about 4 P. M. when it moderated, and at 6 P. M. topsails were set. The latter part of the day there was a strong breeze, and two reefs were made in the spanker. The vessel made little water this day. The next day, the 9th, began with a strong southeast breeze, which freshened to a strong gale. Two reefs were made in main and foresails. At 4 P. M. the spanker and jib were furled. The middle part of the day there was a very sharp gale and heavy sea running. The vessel labored heavily and shipped great quantities of water. The pumps were carefully attended to, and she was found to be making considerable water. The latter part of the day the wind was still increasing and the foresail and the forstay sail were furled. It was then blowing a

'living' gale from the westward. The weather through the night continued to be extremely severe; there was a 'terrific gale of wind.' Planks were carried away from the bulwarks of the starboard side of the vessel, also one of the ports; the waterway on starboard side was started off. The covers of the chain locker and a spar were found loose in the morning, floating in the waist of the vessel on both sides. Coal washed about decks; also buckets and bucket racks; also pieces of bulwark. The forecastle door and galley door were washed off, but were not lost. The men could not stand at pumps on main deck because it was continually swept by the seas, and it was with difficulty that they were able to work at the pump on the poop deck, which was about four and a half feet higher than the main deck, on account of the sea breaking over. Before midnight the vessel was hove to under a storm trysail, two reefed foresail, and forestaysail on the port tack. The vessel was shipping water through the cabin windows, doors, and down the booby hatch. The cabin was situated in the after part of the poop deck. The top of the cabin house was about three and a half feet above the deck. They commenced to take water in the cabin while eating supper, and all through the night it forced its way in. This was unusual and indicated very bad weather and a rough sea. Everything in the cabin was drenched, excepting the berths, with water washing around the cabin with motion of vessel.

Water reached the cargo during the night through the cabin, a strained waterway, and otherwise. The pumps were tried every two hours, and by four o'clock Thursday morning it was discovered by the pumps bringing up guano with the water, that the cargo was wet. The master of the vessel did not go to bed during the night, but was mostly on deck. Previous to 4:30 o'clock in the morning they were able to get a suck on the pumps, indicating that there was not water then in the well, but after that they were unable to do so. At this time the weather was very bad, a very bad sea flooding the decks continually and washing everything movable about. About five o'clock they sounded and found eighteen inches of water in the well. In about half an hour afterwards they wore ship, putting the vessel before the wind, so that the men could stand at the pumps. This gave the vessel a list to port. The only outlets on the port side for the seas that came aboard were the open port above mentioned and the scuppers. They continued pumping, but still were unable to get a suck, and at nine o'clock soundings showed about seven feet of water in the vessel. Preparations were then made to abandon the vessel, as she was supposed to be sinking. The lashings of the boat on the poop deck were cut and the women on board came up from the cabin to take the boat. Between ten and eleven o'clock they wore ship and the vessel slowly righted up, the booms swinging from the port to the starboard side, bring-

ing the port side out of the water. The vessel was then working heavily in the sea, losing steerage way and settling fast. When the vessel righted up and rolled her lee side out of the water, the second mate, who with others fastened with lines to prevent them from being washed away, was working at the pump on the main deck, heard a heavy gurgling sound, and let go the pump and went over to the port side, put his hand against the rail, and looked down under it to where the bilge pump plate was, and saw a hole large enough to put his hand in. He ran his hand and arm down the hole and sung out to the captain, 'Look here!' Being greatly excited and not looking for such a thing he hardly realized what the trouble was. The captain came and said, 'My God, this is the bilge pump!' It was found that the whole bilge pump plate, with the screws, was gone."

38 L. Ed., p. 688.